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No. 94-464

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner,
v.
THE NORTH CAROLINA RAILROAD COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of North Carolina

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BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER [1]

INTEREST OF *AMICUS CURIAE*

The Association of American Railroads (AAR) is a voluntary, non-profit incorporated trade association of the Nation's major railroads. Each of AAR's members is an interstate carrier by rail subject to the jurisdiction of the Interstate Commerce Commission. AAR's members operate approximately 75 percent of the line haul mileage, employ approximately 89 percent of the workers, and produce approximately 91 percent of the freight revenues of all railroads in the United States. AAR represents its members before courts, agencies and the Congress in matters of common concern.

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[1] Petitioner and Respondent have consented to the filing of the brief. The letters signifying consent have been filed with the Clerk.

As the trade association for the Nation's railroads, AAR has a vital interest in ensuring that the federal rail regulatory scheme administered by the Interstate Commerce Commission under the provisions of the Interstate Commerce Act, 49 U.S.C. § 10101a *et seq.*, remains, as Congress intended, the *exclusive* means through which interstate rail commerce is regulated. AAR accordingly has a vital interest in ensuring that federal preemption principles are properly applied to protect against efforts of state and local authorities to interfere with interstate rail carrier operations subject to exclusive Commission jurisdiction. Because the decision of the North Carolina Court of Appeals effectively asserts state court jurisdiction to determine interstate rail transportation matters subject to exclusive Commission jurisdiction with respect to abandonment and inter-carrier track connections and service requirements, AAR has an important stake in urging that federal preemption principles be properly applied and that the decision below be reversed.

STATEMENT OF THE CASE

The state court action for which review is sought in this case involves an effort by respondent, The North Carolina Railroad Company (NCRR), to relitigate in state court a decision of the Commission approving the abandonment of a small segment of track in Charlotte, North Carolina formerly operated in interstate commerce by Petitioner Norfolk Southern Railway Company (NS). NS was initially granted the right to abandon the track pursuant to an exemption application approved by the Commission under regulations applicable to lines that have been "out-of-service" for at least two years. 49 C.F.R. 1152.50(b). The Commission's exemption decision became effective August 30, 1991. Pursuant to the abandonment approval, NS sold the abandoned property to the City of Charlotte for use as a convention center site.

In challenges filed December 10, 1991 before both the Interstate Commerce Commission and the North Carolina

state courts, NCRR sought to reopen the Commission's abandonment decision. NCRR claimed that the abandonment authorization should be revoked because NCRR, pursuant to a lease agreement with NS, allegedly had an express or implied agreement with NS "to keep and maintain a continuous through track connection between NCRR's line and NS' line [over the abandoned property]." Pet. App. 23a-24a, 26a-29a.

The Commission considered and rejected NCRR's claim that NS was required under the terms of the lease agreement to maintain a connection with NCRR over the abandoned line. Pet. App. 24a. The Commission also noted that NS' and NCRR's lines connect north of Charlotte and that regulation of the abandonment was not "needed for the preservation of future rail service by NCRR or another operator." Pet. App. 25a.

NCRR did not appeal from the Commission's decision denying its petition to reopen the abandonment under the applicable federal review statute. 28 U.S.C. § 2344. NCRR instead pursued its claim to a right of "continuous through track connection" with NS before the North Carolina state courts (to which action the City of Charlotte was also made a defendant).

In the decision for which review is sought, the North Carolina Court of Appeals affirmed the lower court's determination that it had subject matter jurisdiction over NCRR's claim against NS. In so doing, the court rejected NS' contention that the issue of NCRR's right to connect with NS over the abandoned property was subject to the exclusive jurisdiction of the Commission. The North Carolina Court of Appeals reasoned that the state courts were not preempted because "the instant case turns on state law construction of written instruments . . . while the I.C.C. ruling applies to the abandonment of the railroad." Pet. App. 8a-9a.

NS' petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

THE JURISDICTIONAL FINDING OF THE COURT OF APPEALS OF NORTH CAROLINA CONFLICTS WITH THE EXCLUSIVE AND PLENARY AUTHORITY OF THE INTERSTATE COMMERCE COMMISSION TO REGULATE INTERSTATE RAIL TRANSPORTATION AND WILL CAUSE SERIOUS UNCERTAINTY UNLESS REVERSED

1. As this Court has repeatedly found, the jurisdiction of the Interstate Commerce Commission to authorize rail abandonment is exclusive and plenary. *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 323 (1981); *Colorado v. United States*, 271 U.S. 153, 164 (1926). The decision whether to permit an abandonment is within the sole discretion of the Commission, charged under the Interstate Commerce Act with balancing the competing local and interstate commerce interests at stake. *Kalo* at 320-21; *Colorado* at 168-69. Once approved by the Commission, an authorized abandonment may be effected regardless of any conflicting claims predicated on state law. *Kalo* at 324-26; *Colorado* at 165 ("even explicit charter provisions must yield to the paramount power of Congress to regulate interstate commerce").

The preemption principles invoked by this Court in *Kalo* and *Colorado* emphatically apply to the abandonment authorized by the Commission in this case. Pursuant to the Commission's abandonment authorization, an abandoning carrier (such as NS in the instant case) has no obligation to provide transportation services of any kind over the abandoned property, including "a continuous through track connection" with another carrier as urged by respondent NCRR. *Kalo* at 323; *Colorado* at 161; *Hayfield Northern R. Co. v. Chicago & N.W. Tr. Co.*, 467 U.S. 622, 635 (1984). Indeed, by authorizing the abandonment at issue, the Commission has specifically excused NS from providing any transportation services

over the abandoned line. Regardless of any claim of right arising under "written instruments" or other state common law obligations, a state court is wholly without authority to compel a carrier to provide transportation services that the Commission has excused it from providing pursuant to the agency's exclusive and plenary jurisdiction over abandonments. *Kalo* at 325-26; *Colorado* at 165; *Hayfield* at 635.

Indeed, the application of federal preemption principles in this case is especially compelling. In authorizing the abandonment at issue, the Commission specifically addressed and rejected the claim raised by NCRR that NS had a contractual obligation to provide a through track connection over the abandoned line. The Commission found that no such obligation existed, and that its imposition as a condition of the abandonment was unnecessary in the interests of interstate commerce. Pet. App. 24a-25a. This express finding by the Commission in exercise of its abandonment approval authority "simply leave[s] no room for further litigation over the matter[] . . . in state court." *Kalo* at 327. In this context, the state court action was an improper collateral attack on the Commission decision, from which NCRR sought no direct appeal.

Moreover, not only is the relief sought by NCRR against NS in the North Carolina state court unavailable to it as a matter of federal preemption in the context of Commission-approved abandonments, it is also unavailable on general preemption grounds related to the Commission's exclusive jurisdiction over interstate rail transportation matters. For the reasons set forth in Petitioner's brief (at 9-17), it is only the Commission, and not state courts, that has the authority to authorize the establishment of track connections between interstate carriers and that can require carriers to enter into interline service arrangements for the conduct of interstate rail operations. *See* 49 U.S.C. § 10901(a) (Commission has exclusive authority to approve a carrier's acquisition, construction

or operation of an additional or extended rail line); *Alabama & Vicksburg Railway Co. v. Jackson & Eastern Railway Co.*, 271 U.S. 244 (1926) (Commission has exclusive jurisdiction over the establishment of track junctions between interstate carriers); *Transit Comm'n v. United States*, 289 U.S. 121, 129 (1933) (Commission has exclusive jurisdiction to regulate extensions of service by interstate carriers). The North Carolina state courts are simply without jurisdiction to order the inter-carrier arrangements for interstate rail transportation sought by NCRR against NS in this case, and the state court decision finding such jurisdiction must be reversed.

2. The decision has the potental to seriously disrupt the federal statutory scheme for the regulation of interstate carriers, particularly in the area of abandonments. Unless reversed, the decision below will encourage opponents of Commission-approved abandonments to seek to create state law claims predicated upon express or implied contracts (or other "equitable" rights) upon which to mount direct or collateral attacks on Commission abandonment decisions in state court. Should such litigation tactics become widespread, the abandonment reforms effected by Congress in the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act)[2] and the Staggers Rail Act of 1980,[3] would be jeopardized or rendered nugatory, and the abandonment process would no longer be the uniform federal one mandated by Congress under the provisions of the Interstate Commerce Act. *See Kalo* at 320-21; *Hayfield* at 628-31. Such potential consequences of the decision below should not be countenanced by this Court.

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[2] Pub. L. 94-210, 90 Stat. 31.

[3] Pub. L. 96-448, 94 Stat. 1895 (codified at 49 U.S.C. §§ 10903-10906).

CONCLUSION

For the reasons stated above and for the reasons set forth in the Petition, this Court should grant the petition for certiorari and reverse the decision below. If the Court concludes that plenary consideration is not warranted, the judgment of the North Carolina Court of Appeals should be summarily reversed on the authority of *Chicago and N.W. Transportation Co. v. Kalo Brick & Tile Co., supra.*

Respectfully submitted,

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